

# HOLIDAY TIME?

Transferring a traditional public holiday is not allowed, even if there is mutual agreement from both parties, says Charlotte Hatlauf-Coles. She outlines a recent Supreme Court decision.

**A RECENT SUPREME COURT** decision held that it is not possible for employees and employers, even by mutual agreement, to transfer the status of a 'traditional' public holiday (ie, any of the 11 public holidays defined by Section 44(1) of the Holidays Act 2003) to another day.

In *NZ Airline Pilots' Association Industrial Union of Workers Incorporated v Air New Zealand Limited*, a dispute arose between Air New Zealand and its pilots over whether the airline had to pay the pilots time and a half if they worked on a traditional public holiday.

## Roster system

Air New Zealand argued that the collective employment agreement between the parties allowed it to direct its pilots to work (in accordance with its roster system) on a traditional public holiday. This was undisputed by the pilots.

However, Air New Zealand further contended that the agreement provided for the transfer of the status of the 11 traditional

public holidays to other days and that, therefore, the 11 traditional public holidays had ceased to be public holidays.

Accordingly, Air New Zealand asserted that pilots who were required to work on a traditional public holiday were not entitled to receive payment of time and a half for that day.

Air New Zealand relied on section 44(2) of the Holidays Act 2003 in making this argument. This section states that an employer and an employee may agree that a public holiday is observed by the employee on another day.

## Crucial issue

The crucial issue in this case was whether section 44(2) of the Act allows an employer and an employee to agree to transfer the status of a traditional public holiday to another day.

The majority of the Supreme Court held that employers and employees are not entitled to transfer the status of a traditional public holiday to another day, even by mutual agreement.

Three reasons were given for the decision.

First, the majority considered that if Parliament had intended that individual employers and employees could depart from the statutory definition of a public holiday, section 44(2) of the Act would have contained clear terms to empower the parties to redefine public holidays. The majority concluded that no such clear words were contained in section 44(2).

Secondly, the majority observed the strong focus in the legislation and its history and the requirement to pay time and a half if an employee works on a public holiday.

They emphasised that there had never been any suggestion that the status of a traditional public holiday could be transferred to another day so that an employee who worked on a traditional public holiday was not entitled to be paid time and a half for that day.

Finally, the majority of the Supreme Court recognised that the common understanding of



public holiday is the day on which the majority of the public have a holiday.

In summary, employees and employers are not able to contract out of the Holidays Act 2003 and transfer the status of the 11 traditional public holidays (provided for by section 44(1) of the Act) to other days. **et**

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